IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

United States of America,
Ex Rel. Dale Thomas Vosika
and Rob Thompson,

Plaintiffs,

vs.

Starkey Laboratories, Inc.,

Defendant.

Case No. 01-709 DWF/SRN

STARKEY LABORATORIES' MOTION FOR DISMISSAL WITH PREJUDICE OF SECOND AMENDED COMPLAINT AND RENEWED MOTION REGARDING STATUTE OF LIMITATIONS

INTRODUCTION

The Second Amended Complaint against Starkey Laboratories fails of its own accord because what relators have pleaded never existed, and could not legally have existed. Straightforward analysis of the Second Amended Complaint alongside the contractual documents in issue[1] make it plain and clear that the "Price Reduction" terms upon which this litigation is predicated are non-existent and provide no legal foundation for this False Claims Act (FCA) suit.

Multiple Award Scheduling (MAS) contract protocols invest wide discretion in the individual contracting officer responsible for a given contract, including determination of all pricing terms which will govern the contract. In this case, the contracting officer did not exercise that discretion to include the purported price reduction terms asserted by relators. The pricing terms that *were* executed by the contracting officer provide a simple percentage discount from prices set forth in a contractually specified commercial price list. Over the duration of the contract, the Veterans Administration (VA) received that for which it negotiated and contracted.

[1] Despite the Court's express concern at the January 23, 2004 motion hearing, relators have failed to attach a copy of the contract to their Second Amended Complaint. Starkey is providing to the Court the entire VA contract file as submitted by the United States in response to a FOIA request of relators. Per FOIA protocol, the materials (FOIA 000001 et seq.) were provided to Starkey before being sent to relators.

The interpretation set forth by relators is a far-fetched stretch which departs unacceptably both from the express terms of the contract and the regulatory scheme which governs MAS contracting. That interpretation can in no way support continuation of this ill-founded suit, which is subject now to dispositive dismissal with prejudice.

PROCEDURAL AND FACTUAL BACKGROUND

I. *Litigation History*

This is the relators' third complaint against Starkey. The first complaint, filed on April 25, 2001, remains under seal, with no opportunity for Starkey to analyze its allegations.[2] The First Amended Complaint was filed on December 17, 2001, but unsealed and served in July, 2003, after the United States declined to intervene.

The Court dismissed the First Amended Complaint without prejudice on February 20, 2004, pursuant to Starkey's motion under Fed. R. Civ. P. 9(b). The Court reserved ruling on Starkey's statute of limitations motion which motion remains pending and is hereby renewed given the current allegations which include claims made prior to December 18, 1995. The Second Amended Complaint ("Complaint")[3] was filed by relators within the deadline of the Court's February 20, 2004 Order.

The Complaint alleges two different FCA violations. First, relators claim that Starkey submitted false pricing data to the VA in response to the contract solicitation. According to relators, Starkey was required to disclose the *absolute* lowest price *ever* offered to *any* of its then 6,000 commercial accounts, as well as to disclose *every* type of discount or discount program Starkey has *ever* given to *any* of its customers. (Compl. ¶¶ 8, 27, 33).

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[2] Relators have failed to seek unsealing of the original complaint which is essential to Starkey's renewed motion under the FCA's statute of limitations. If relators seek to argue the relation-back doctrine, they must present that Complaint on the record. (Def.'s Reply Mem. at 11-12 (Dec. 15, 2003).

[3] For this motion only, Starkey accepts as true the assumptions found in relators' Second Amended Complaint.

Second, relators claim that Starkey failed, pursuant to the contract's Price Reduction Clause, to reduce the VA's prices and provide rebates during the contract period after making sales to a handful of commercial accounts at prices below the VA contract prices. (Compl. ¶¶ 28-30.) Relators allege that during the entirety of the contract period, Starkey was required to monitor and disclose *every* price discount *ever* provided to *any* of its then 6,000 customers – if Starkey sold just one hearing aid to a commercial account at a price less than the VA paid for the same hearing aid, every subsequent VA sale constituted a FCA violation. (Compl. ¶¶ 8, 28-30, 33.) With respect to both claims, relators allege a fraudulent scheme to knowingly charge the VA more than it charged its other customers. (Compl. ¶¶ 27, 33.)

For the reasons and legal arguments set forth below, elemental and insurmountable legal flaws pervade relators' case against Starkey, and the instant motion seeks final dispositive relief against their FCA prosecution.

II. *Contract History*

A. The VA's Solicitation

In February 1994, the VA solicited proposals for the purchase of Custom Hearing Aids (CHA) under the MAS contracting protocols of the General Services Administration (GSA).[4] [FOIA 000331, 000471] The Solicitation required "IDENTIFICATION OF A PRICELIST AS THE BASIS FOR TH[E] OFFER," and required the offer to be stated as a percentage discount from the offeror's commercial pricelist. [FOIA 000361] (emphasis original). The VA considered this solicitation both "novel and complex," specifically its "Evaluation Factors for Award" (Section M). [February 2, 1994 memorandum from Director of Acquisition Policy and

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[4] MAS Procurement Contracts are government agency contracts awarded to multiple suppliers for purchase of the same products. 48 C.F.R. § 38.102-2(a)(1991); 48 C.F.R. § 8.403 [GSA 001127]; 48 C.F.R. § 38.102-2(b); FSS CH 38-6 [GSA 001153].

Review Service; FOIA 000562-565, 574] The Director described the Section M criteria as "unique," and outside the usual contracting experience. [FOIA 000574].

B. Starkey's Offer

Starkey manufactures and sells hearing aids, accessories, parts and supplies. (Compl. ¶ 5.) Starkey's products come in several sizes, with variations depending on electronic circuitry and design features, resulting in thousands of customized product configurations. (Compl. ¶ 6.) Starkey does not typically sell hearing aids directly to the public, and does not have franchise or other retail outlets. (Compl. ¶ 14.) All of Starkey's customers are dealers and dispensers; there is no wholesale versus retail breakout among its customers. At the time of the VA solicitation, Starkey sold product to more than 6,000 different commercial accounts who then fit and resold customized hearing aids to individual patients. (Compl. ¶¶ 14, 28.)

Starkey, through its designated employee, Richard Handburg, who died on April 9, 2002, responded to the VA's solicitation by providing the required Discount Schedule and Marketing Data (DSMD). The response data described the spectrum of price discounts (6% to 23%) generally offered to Starkey's commercial accounts, with an additional aggregate discount (3%). [FOIA 000361-70] Starkey identified its February 7, 1994 commercial pricelist as the basis for the discounts. [FOIA 000361-70] Starkey neither named the customers who received these discounts nor indicated which hearing aids or configurations received which discounts. *Id.* Nor did Starkey identify any Most Favored Customer (MFC) or category of customers upon whom its offer was based. *Id.* Starkey indicated FOB origin terms for its commercial customers and also disclosed additional available discounts to its commercial customers through a co-op battery discount program. *Id.* In its response, Starkey offered the VA discounts ranging from 37% to

40.5% on five types of hearing aids, a 30% discount on all options and accessories, and OSP circuitry and second-year warranty to both at no cost. *Id.*; [FOIA 000592-596]

C. The Parties' Negotiations

The VA's assigned contracting officer, Elaine Williams, received and reviewed Starkey's offer. As required by government contracting procedures, she first prepared a written Price Analysis and then a Prenegotiation Memorandum.[5] In her Price Analysis, Williams noted that the Starkey offer was based upon its commercial price list; she compared the discounts to those offered in a prior contract. [FOIA 000293-94] Her Price Analysis sets forth no MFC or category of customers upon whom the offer was based, indicating only that the prior award was predicated on prices offered to Starkey's "Dealers/Distributors." *Id.*

In her Prenegotiation Memorandum, Williams identified the VA Negotiation Objectives: "[t]o obtain discounts from offeror's established catalog or commercial price list which equal or exceed discounts offered by offeror to its most favored customer for compatible quantities, terms and conditions." [FOIA 000295-96] She articulated the VA's objective target as a 45% discount on hearing aids, a 50% discount on second-year warranties, and a 38% discount on options, all from Starkey's standard commercial pricelist. *Id.*

In doing so, Williams wrote that Starkey provided "Basic Discount(s) from its standard commercial price list" as a "23% discount with a 3% aggregate discount." In response to Starkey's offer, the contracting officer submitted a September 7, 1994 counteroffer to Starkey

[5] The 1982 GSA Policy Statement which governs MAS contracting requires documentation of all aspects of the negotiation and acceptance of MAS contracts. PIB 88-7 [GSA 001814-16]; PIB 91-4 [GSA 0000462]. (The GSA materials were produced to Starkey in response to a FOIA request and are attached as Exhibit C to the Symchych Aff.) The Prenegotiation Memorandum must include a description of the procurement process, confirmation of the information submitted by the contractor, the elements analyzed in preparing the negotiation objectives, the actual objectives themselves and their rationale, major differences between the offer and the objectives, and any rationale for accepting less than an MFC discount. FSS CH 38-95 [GSA 001408-09]; FSS MAS Desk Guide at K6-K8 [GSA 001395-97]. The Prenegotiation Memorandum incorporates the Price Analysis and must clearly identify the customer upon whom the negotiation objectives are based. FSS MAS Desk Guide at K6-K8 [GSA 001395-97; PIB 89-13 [GSA 000304-06]

consistent with these Negotiation Objectives. [FOIA 000276-77]. Starkey responded on September 8, 1994, with its "best and final offer," stating:

> The discounts from the established 'Commercial Pricelist' dated February 7, 1994 as submitted with the Solicitation RFP 791-1-94 and displayed on 'STARKEY PRICE EXHIBIT 'A'' are the maximum that we can offer on the hearing aids bid.
>
> We will however offer a 31% discount on all options included on our 'Commercial Pricelist' and will include at no-charge the CRR II option whenever ordered. [FOIA 000274]

In response, Williams contacted Handburg for clarification on the OSP circuitry, which was erroneously designated as having a cost. *Id.* Starkey then submitted a revised offer September 14, 2004, altering only the OSP option. [FOIA 000282]

Negotiations ended on September 14, 1994, and the contracting officer then prepared two Price Negotiation Memoranda (PNM).[6] In the first PNM, Williams recounted the negotiations leading up to acceptance of the offer, reiterating her objective to "obtain a fair and reasonable price based on their established commercial prices sold to the general public," and indicating that Starkey had "submitted their current published pricelist." She concluded:

> It is the determination of the Contracting Officer that this offer is favorable to the Government and prices considered fair and reasonable based on the following: Starkey Labs is offering the Government a 37%, 39.2%, 39.3%, 40.5% discount on hearing aids from their standard commercial pricelist of September 14, 1994 and a 31% discount off all options. The terms offered the Government are Net 30 and FOB Destination.

[FOIA 000284]. Williams included no MFC identification. [FOIA 000283-84] The second PNM identifies six reasons for recommendation of the Starkey award.[7] [FOIA

[6] The Price Negotiation Memorandum is "the document that relates the story of the negotiation." FSS MAS Desk Guide at L1 [GSA 001447] (emphasis added); 48 C.F.R. 15.808 (1991). (The relevant regulations are attached as Exhibit B to the Symchych Aff.) Among other things, the PNM must identify the customer upon whom the award is predicated and the price reduction clause is triggered. FSS CH 38-98 at 225 [GSA 001471]; 48 C.F.R. § 15.808.

[7] The reasons identified are that 1) the base discounts of hearing aids plus options is less than offered MFC; 2) VA discount on second year warranty is higher for the government; 3) government contract is FOB Destination, whereas all Starkey's other contracts are FOB Origin; 4) Starkey commercial customers will experience increases in the

000292-99] The reasons set forth terms favorable to the VA beyond any price comparison with a non-identified MFC. This PNM also compares the VA discounts from the February 7, 1994 pricelist to the general, non-specific discount information provided by Starkey in its offer. *Id.* The second PNM, like the first, identified no MFC as the basis of award for the contract. Based on these memoranda, the Director of the VA's Acquisition Policy and Review Services allowed the award. [FOIA 000278-80].

Throughout the negotiation process, Williams never requested additional information from Starkey on the MFC subject. [FOIA Generally]. Neither did she seek additional information about discounts Starkey provided. *Id.* As noted above, Williams based her negotiation on the basic discounts from Starkey's standard commercial price list. *Id.*

D. The Award

The official Notice of Award (known as the SF 26) for the 1994 Contract, [FOIA 00257], dated September 27, 1994, states:

> Awarded discounts are based from your standard commercial pricelist effective February 7, 1994. A copy of the pricelist identifying those products accepted for award is attached herein and made a part of this contract. Awarded items are marked by an 'A.'

[FOIA 000258] The Award does not include any MFC or customer that would trigger the Price Reduction Clause. [FOIA 000257-72] Instead, it includes reference to the boilerplate Price Reduction Clause (I-FSS-390), and states that the "contract is predicated on the Government receiving terms better than the terms you offer your dealers (dispensers)." [FOIA 000259]

The contract's term was October 1, 1994 through September 30, 1996. [FOIA 000257] During the contract, Gail Hixon took over as the contracting officer; she and Handburg administered the contract to its conclusion. [E.g. FOIA 000253] The VA opted by written

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commercial price during the contract tenure, but government will not; 5) prices did not increase from the previous contract; and 6) discounts on options were increased over the previous contract. [FOIA 000292] extensions to extend the contract through September 30, 1997. [FOIA 000221] There were other modifications adding and deleting certain products. [FOIA 000067, 70, 115, 150] Through all the extensions and modifications, the same discount agreement continued. [FOIA 000067, 70, 115, 150, 221] Relators have not alleged that Starkey reduced the prices on its February 4, 1994 commercial pricelist during the duration of the VA contract.

ARGUMENT

I. STANDARD FOR RULE 12(b)(6) MOTION TO DISMISS WITH PREJUDICE

In deciding a Rule 12(b)(6) motion, the court need not accept as true conclusory allegations or legal conclusions drawn by the pleader from the facts. *Silver v. H&R Block, Inc.*, 105 F.3d 394, 397 (8th Cir. 1997); *SL Montevideo Tech., Inc. v. Eaton Aerospace, LLC*, 292 F. Supp. 2d 1173, 1178 (D. Minn. 2003). Moreover, allegations or inferences that are contradicted by the facts pleaded or set out in exhibits attached to or incorporated in the pleading will not prevent a motion to dismiss from being granted. *United States ex rel. Wilkins v. N. Am. Constr. Corp.*, 173 F. Supp. 2d 601, 617-18 (S.D. Tex. 2001); 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1363 (2d ed. 1990.)

The court may consider facts presented in exhibits provided by the defendant without converting the motion to one for summary judgment under Fed. R. Civ. P. 56:

> [A] defendant may introduce certain pertinent documents if the plaintiff failed to do so. Documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim.

Venture Assocs. Corp. v. Zenith Data Sys. Corp., 987 F.2d 429, 431 (7th Cir. 1993); *Thompson v. Olsten Kimberly Quality-Care, Inc.*, 980 F. Supp. 1035, 1037 n.1 (D. Minn. 1997); Wright & Miller, § 1327. ("[W]hen plaintiff fails to introduce a pertinent document as part of his pleading, defendant may introduce the exhibit as part of his motion attacking the pleading."). A plaintiff cannot defeat a motion to dismiss by choosing not to attach a complete copy of a pertinent document to the complaint. *Silver*, 105 F.3d at 397. The contract under which an allegedly false claim was made falls squarely within this rule. *See, e.g., Wilkins*, 173 F. Supp. 2d at 617-18.

II. WHEN CONTRACT TERMS REQUIRE JUDICIAL INTERPRETATION, THERE IS NO FCA VIOLATION AS A MATTER OF LAW

The FCA "is primarily directed against government contractors' billing for nonexistent or worthless goods or charging exorbitant prices for delivered goods." *United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 460, (5th Cir. 1977) (citing *United States v. McNinch*, 356 U.S. 595, 599 (1958)). It is not the case that any breach of contract, or violation of regulations[8] or law, automatically gives rise to a claim under the FCA; knowledge of falsity is required. *United States ex rel. Quirk v. Madonna Towers, Inc.*, 278 F.3d 765, 767 (8th Cir. 2002). Indeed, "[i]ndication is absent that Congress intended to penalize good faith disputes over contract liability." *Tyger Constr. Co. v. United States*, 28 Fed. Cl. 35, 56 (Fed. C1. 1993).

When a FCA case depends upon interpretation of a contract, the question is one of law for the court. *E.g., Southland Mgmt. Corp.*, 326 F.3d 669, 674-75 (5th Cir. 2003) (en banc); *United States ex rel. McCoy v. Seaward Marine Servs., Inc.*, 972 F.2d 344 (4th Cir. 1992). If the language of a contract provision is unintelligible when read literally, the court should apply practical interpretation of it. *United States v. Data Translation, Inc.*, 984 F.2d 1256, 1259 (1st Cir. 1992). When a single portion of a lengthy contract is unintelligible, but yet severable from the remainder, the court may strike a portion itself without affecting the remainder; if not, the judge should direct a verdict against the party demanding enforcement of the clause. *Id.*

[8] Unlike pure administrative law disputes, where an agency's interpretation of its own regulations receives deference, *see Trinity Broadcasting of Fla., Inc., v. FCC*, 211 F.3d 618, 625 (D. C. Cir. 2000), to find liability under the FCA, the contract and regulatory requirements must not be subject to differing reasonable interpretations. *United States ex rel. Norbeck v. Basin Electric Power Co.*, 248 F.3d at 781, 792 (8th Cir. 2001); *compare Trinity Broadcasting*, at 628 (due process prohibits agency from depriving a party of property where regulations and other public statements issued by agency do not allow a reasonable person, acting in good faith, to identify, with ascertainable certainty, the standards with which it must comply).

In keeping with these principles, the FCA requires proof of an objective falsehood. *Hagood v. Sonoma Cty. Water Agency*, 81 F.3d 1465, 1477-78 (9th Cir. 1996); *Quirk*, 278 F.3d at 767 (innocent mistakes and negligence are not defenses under the FCA; a lie is required). Expressions of opinion or errors based simply on faulty calculations or flawed reasoning, scientific judgments, or conclusions about which reasonable minds may differ cannot be false. *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1018 (7th Cir. 1999); *Wang v. ex rel United States v. FMC Corp.*, 975 F.2d 1412, 1420-21 (9th Cir. 1992). Therefore, a false claim for payment cannot arise where reasonable differences exist regarding what is required under a contract. *Norbeck*, 248 F.3d at 792, 804 ($35 million bench verdict overturned because defendant's contract interpretation was reasonable); *Commercial Contractors Inc. v. United States*, 154 F.3d 1357, 1366 (Fed Cir. 1998).

For these reasons, the FCA is not an appropriate vehicle for policing technical compliance with government contracts or administrative regulations. *Lamers*, 168 F.3d at 1020. "The penal nature of the statute requires careful scrutiny to see if the alleged misconduct violates the statute." *Weinberger*, 557 F.2d at 460 (citing *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 542 (1943)). Something beyond mere negligence or "simple contract breaches" must be shown for liability to attach. *Norbeck*, 248 F.3d at 792, 794 (holding that "small edges" taken by contractor in various areas of cost computation cannot support FCA liability). Thus, the courts must bear in mind that "[w]hether language is too indefinite to create a legally cognizable statutory right is entirely separate from whether that language can form the basis of a 'false claim' action under the FCA." *United States v. Southland Mgmt. Corp.*, 288 F.3d 665, 688 (5th Cir. 2002); aff'd on reh'g, 326 F3d 669 (5th Cir. 2003) (en banc). The pricing arrangement in the Starkey – VA contract and the triggering of the Price Reduction Clause fall squarely into this domain, where the FCA has no proper application.

III. UNDER THE MAS FRAMEWORK, THE STARKEY CONTRACT IS BASED UPON DISCOUNTS FROM THE DESIGNATED PRICELIST.

The starting point for determining whether a government contractor can bear any liability under the FCA must be the contract, regulation or statute that supposedly warrants it. *Id.* The VA contract file demonstrates that the notice of award and preceding contract negotiations were based upon discounts from the designated commercial pricelist. The negotiations at no point addressed discounts for any specific product configurations from among the thousands of combinations that could be customized, and instead were limited to the general range of discounts which Starkey provided to its customers. The negotiation record maintained by the VA nowhere shows any discussion or exchange of information regarding any particular MFC or any identified category of MFC. The combination of what is present in the record and what is not present confirms that the commercial price list was the basis of the negotiation and award. [FOIA 000295-96]. This is evident as early as the solicitation stage, which required that offers be stated in terms of a percentage discount from the offeror's commercial pricelist and required also that the pricelist be specifically identified. [FOIA 000361]

Starkey, in response to the solicitation, was legally exempt from certification of cost and pricing data because its offer prices were based on "established catalog or market prices of commercial items sold in substantial quantities to the general public." 48 C.F.R. 15.804-3 (1993); PIB 89-6 [GSA 000322]; FSS MAS Desk Guide at D1-D4 [GSA 001232-35]. Therefore, Starkey's submission of a general range of commercial discounts fully satisfied both the solicitation and the regulatory framework. *See* FSS MAS Desk Guide at C3 - C4 [GSA

001216-17] (requiring pricelist) and FSS CH 38-91 [GSA 000725] (requiring only a sampling of discount and sales information).

Despite her responsibility and authority to reject Starkey's offer out of hand[9] on grounds of a defective submission, or to seek additional pricing or MFC information, Williams did neither. *Id.* Moreover, Section M of the solicitation specifically granted the contracting officer the right to examine Starkey's business records to verify all submitted cost and pricing data. [FOIA 000390] She chose not to do so before awarding the contract. The contracting officer's authority extends even more broadly, however, allowing significant discretion in arriving at negotiation objectives, including selection of the method of price analysis for each case, evaluation of offers, and making of awards. 48 C.F.R. § 15.805-2 (1991); *see also Banknote Corp. of Am. v. United States*, 365 F.3d. 1345, 1355 (Fed. Cir. 2004); *Illinois Glove Co. v. United States.*, 1986 U.S. Dist. LEXIS 21624 at *26 (N.D. Ill. Aug. 12, 1986) (attached in Exhibit D to the Symchych affidavit). As the contracting officer, Williams could use whatever price analysis techniques she wished to ensure fair and reasonable prices. *Protest of Control Data Corp.*, 92-1 B.C.A. (CCH) p.24, 555, 1991 WL 29040 (GSBCA) 533, at *26 (Oct. 23, 1991) (all contracting and unpublished cases are attached in Exhibit D to the Symchych affidavit) (citing to 48 C.F.R. 15.805-2); *see also* FSS CH 38-91 [GSA 000725]

Consistent with her discretion and agency guidance, Williams analyzed Starkey's offer and discount information, together with historical contract and other market information, and determined that Starkey's offer was fair and reasonable. *See* 48 C.F.R. § 15.805-3 (1991); FSS MAS Desk Guide at F 30 - F38 [GSA 001291 - 99], and K4 [GSA 0001393] [FOIA 000283-84]. She determined in the negotiation and contract award documents not to specifically identify any

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[9] The contracting officer has wide discretion to reject incomplete or defective submissions. FSS MAS Desk Guide at F36 [GSA 0001297].

MFC or class of customers as the basis for the VA award[10] [FOIA 000283-84] Instead, for example, in the critical Price/Discount Analysis, she tied her evaluations to the range of commercial discounts from the price list. [FOIA 000293] As explained in the FSS MAS Desk Guide, the "price/discount analysis is the conclusive explanation of the commercial discounts, terms and conditions, and therefore, depicts all of the essential contents, of the offer." FSS MAS Desk Guide at K6 [GSA 0001395]. The 1994 Starkey contract was solicited, negotiated, and accepted upon this general discount range, and not upon a MFC designation.

That Williams' negotiation objectives were based upon this discount range is apparent also from the Prenegotiation Memorandum, which tellingly states the VA's objective: "To obtain discounts from offeror's established catalog or commercial price list which equal or exceed discounts offered by offeror to its most favored customer for compatible quantities, terms and conditions." [FOIA 000295-96] Even in view of this objective and the regulatory authority, Williams did no analysis or price relationship calculations based upon any identified MFC. *Id.*

The two Price Negotiation Memoranda also depict the pricing relationship to the commercial pricelist discounts and not to any identified MFC. Indeed, in the final Price Negotiation Memorandum, the contracting officer includes a comparison of the savings to the government in purchasing from Starkey rather than *on the open market.* [FOIA 000298]

The Award, which is the document putting the contractor on notice of the exact terms to which it will be subject**,** 1982 GSA Policy Statement X8-X11 [GSA 001781-84], also provides that the VA contract prices are based on percentage discounts off the Starkey commercial pricelist. The regulatory scheme requires that the agency must identify the pricelist upon which the award is based and delineate all the essential terms of the award, including identification of the commercial customer upon whose prices the price reduction clause is triggered. FSS CH 38-118; [GSA 001483] FSS CH 38-96 [GSA 001560]. The SF 26 here contains the boilerplate[11] price reduction clause which, under the regulatory structure, is triggered if the price relationship with the designated MFC is disrupted or if the prices in the established pricelist are reduced. (emphasis added). FSS MAS Desk Guide at P1 [GSA 001552]; 1982 GSA Policy Statement X-8-X11 [GSA 001781-84]; FSS CH 38-65 [GSA 001558]

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[10] The GSA Policy Statement [GSA 001774-806] recognizes that "most favored customer" discount arrangement is the cornerstone of MAS pricing. *Id.* at X5 [GSA 001178] The MFC concept is designed to obtain for the government a pricing arrangement better than that given to a contractor's most favored commercial customer for the same products in similar quantities and circumstances. *Id.* [GSA 001778] The GSA Policy Statement recognizes that the concept of MFC pricing seems simple, but in application is very complex. *Id.* at X4 [GSA 001777]

Although the regulatory guidance requires that any customer whose sales will trigger the Price Reduction Clause must be identified in the Award Notice, Williams elected not to make a specific MFC in the contract, and merely identified Starkey's "dealer (dispensers)" the group which generally received the range of disclosed discounts. Starkey's dealers and dispensers represent 100% of its commercial accounts. (Compl. ¶ 14.) Agency guidance prescribes that a MFC must be an individual customer or category of customers, and not the contractor's entire pool of commercial customers. PIB 89-10 [GSA 000311-12]; FSS MAS Desk Guide at K1-K3 [GSA 001390-92]. Consequently, the Starkey contract Price Reduction Clause can be triggered only by a reduction of prices from the February 2, 1994 pricelist upon which the award was based. Relators, however, do not allege such a price reduction. It is not the case under the terms of the contract that the price reduction clause can be triggered by a sale to any given customer.

Relators' allegations are also undermined by their rudimentary price comparison between the products sold to the VA and to Starkey's commercial accounts; they do not even attempt an "apples-to-apples" price analysis. Although the Price Reduction Clause states that the VA is to receive "terms better than the terms" Starkey offers its "dealers (dispensers)," relators engage

[11] Under the 1982 GSA Policy Statement, all MAS contracts must contain a price reduction clause, I-FSS-390, whose purpose is to maintain the price relationship between the designated commercial customer and the government throughout the contract period.

only in a superficial price comparison that ignores the many favorable terms exclusively available to the VA, most notably the absence of any obligation on the VA to make any purchases. [FOIA 000333] Additionally, the VA had advantageous terms regarding inclusion of OSP circuitry at no cost, a 30% reduction on the cost of second-year warranties, a 31% reduction on the cost of options, no charge for shipping, and more favorable payment terms. [FOIA 000333, 000361-70; 592-96]. Relators also ignore the thousands of product configurations and the dizzying possible combinations of discounts pertaining to the components; yet their complaint admits their knowledge of this apples-to-apples issue. (Compl. ¶ 6).

Under the regulatory scheme, the VA contracting officer, had significant discretion to negotiate a contract based on a designated MFC or meaningful category of customers. Nothing in the contract documents indicates such a basis of award. Relators' conclusory and superficial reliance on a boilerplate Price Reduction Clause, their oversimplification of the type of falsity required by the FCA, and their failure to meaningfully analyze and compare the product and terms being offered to the VA and other customers all serve to poison the legal predicate for the Second Amended Complaint.

IV. RELATORS' LITERAL INTERPRETATION OF THE PRICE REDUCTION CLAUSES OF THE STARKEY CONTRACT FAILS TO STATE A COGNIZABLE FCA CLAIM.

A. *United States v. Data Translation, Inc.*

That relators' Complaint fails to state a claim is clear under the First Circuit Court of Appeals' decision in *United States v. Data Translation, Inc.*, 984 F.2d 1256 (1st Cir. 1992), authored by then Chief Judge Stephen Breyer. *Data Translation* set a precedential benchmark for FCA claims arising from MAS procurement contracts, and arose from allegations and contract provisions stunningly similar to this case. The Court held that a practical, not literal, interpretation of the contract is required as a matter of law before imposing any liability, particularly FCA penalties. *Id.* at 1263-67. Justice Breyer, writing for the court, rejected out of hand the very same interpretation of the contract urged here by relators, and concluded that a MAS contract cannot be interpreted to require a government contractor to monitor or disclose every sale and every discount offered to every customer prior to and during the contract period. Consequently, the alleged nondisclosure in this case cannot support a FCA claim.

As relators do here, the government in *Data Translation*[12] claimed that the contractor's "failure completely and accurately to disclose price discount information made all of its subsequent payment requests 'false' and 'fraudulent.' *Id.* at 1266. During negotiations the contractor was asked to fill out a "detailed, complex, seventy-eight page questionnaire" requesting price discount information, and instead submitted a three-page summary of discounts made available to nongovernmental customers. *Id.* at 1258-59.

The contract included a price reduction clause, which provided:

> *If*, subsequent to the award of any contract resulting from this solicitation, it is found that *any price negotiated . . . was increased by any significant amount because the prices, data, and facts were not as stated in the offeror's 'Certificate of Established Catalog or Market Price,' then the contract price(s) shall be reduced* by such amount and the contract shall be modified in writing to reflect such adjustment.

Id. at 1258. (emphasis in original). The Certificate of Established Catalog or Market Price, which was contained in the seventy-eight page questionnaire/Offer, stated that the contractor certified that all "data submitted" are "accurate, complete and current." *Id.* at 1258-59.

In support of its FCA claim, the government urged the court "to read the contract's 'discount disclosure' language literally, as requiring the contractor to reveal *every price discount* it provided *any* of its customers *ever* . . .". *Id.* at 1260 (emphasis is original). The court noted

[12] The majority of the court's reasoning in *Data Translation* addresses the government's breach of contract claim, *id.* at 1257-66, but the same rationale was held applicable to the FCA claim. *Id.* at 1266-67.

that a literal reading of the contract indeed "seem[ed] to call for such a complete disclosure," and concluded that the sheer "exhaustiveness of the disclosure that the language literally demands" was the very reason a FCA cause of action could not lie. *Id.* at 1260-61. Justice Breyer noted that "one must examine the relevant provisions, not necessarily as the GSA intended them, but rather from the perspective of a *reasonable person* in DTI's (the contractor's) position." *Id.* (emphasis in original). The court then concluded that no reasonable person negotiating with the government "could have believed that the Government really wanted the complete and total disclosure for which the language seems to ask." *Id.* at 1261. In the business context, a "reasonable supplier would not read the language, in context, as calling for complete, literal disclosures, whatever the GSA author subjectively may have intended." *Id.* at 1262.

The court next concluded that the government's interpretation of the contract would undermine the statutory context, noting that "Congress authorized, and the GSA designed, the MAS program as a *simplified* alternative for government procurement of common items sold competitively in the commercial marketplace." *Id.* (emphasis in original). The court went on to describe the rationale of the MAS program:

> Under the MAS program, the existence of competition in the commercial marketplace itself helps to provide assurance of low prices for the government as well. The listing of several competing [businesses] in the government MAS catalogue provides added assurance of low prices. The MAS negotiating process, with its questionnaire answers (and later audits to ensure compliance), offers a third way to guarantee 'low prices.' To the extent, however, that the questionnaire and audits become as burdensome as the 'sole source' selection process, the MAS program abandons its basic 'simplification' rationale . . ..

Id. Summing up, the court stated,

> [A] system that lays down a literal rule with which compliance is inordinately difficult, turning nearly everyone into a rule violator, and then permits the agency to pick and choose when and where to enforce the rule, is obviously undesirable.

Id. at 1262-63.

Concluding that the government's proffered literal interpretation of the contract was inappropriate, the court settled on "an alternative, intelligible reading of the questionnaire," which called for a "'*practical'* effort to supply *relevant* price discount data." *Id.* In doing so, the court considered the underlying contract negotiations. The contracting officer had given "the distinct impression" that the contractor did not have to comply with the questionnaire "as read literally." *Id.* at 1263. Among other things, the contracting officer had reviewed and deleted certain of the discount information provided, was aware of various discounts not set forth in the disclosure, and inferred that only those discounts that applied to the same type of purchases the government intended to make should be disclosed.

The court concluded that the contractor complied with this practical interpretation of the contract as a matter of law because the undisclosed discounts given to Special Price Customers and pursuant to Volume Purchase Agreements were not comparable to the MAS purchases of the government. *Id.* at 1264-66. The court noted that the Volume Purchase Agreements were irrelevant because the government, unlike those purchasers who got a quantity discount, makes no commitment to purchase anything in fact under a MAS contract. *Id.* at 1265.

B. *Data Translation* Dictates The Result Here.

1. The Pricing Negotiation Claim.

The facts of this case both as pleaded and as demonstrated by the contract, are analogous to *Data Translation*, (as are the allegations underlying the two matters). In order to be considered for the MAS contract, Starkey was required to provide information regarding prices and discounts given to its commercial customers. When it responded to the VA's 87-page questionnaire (as in *Data Translation*), Starkey did not provide separate discount information for each customer, each model, or each model line. [FOIA 000361-70] Instead, Starkey provided its commercial price list and the range of general discounts (6% to 23%) offered to its commercial accounts. [FOIA 000363]

The contracting officer on the official VA record cannot have deemed the non-specific discount data provided by Starkey insufficient. In her discretion, she proceeded with the contracting process despite being entitled to seek explanation and supplementation or to simply reject the offer. FSS CH 38-92 [GSA 000725-26]; s*ee also Weinberger,* 557 F.2d 461; *Lamers,* 168 F.3d at 1019. The VA file shows no request that Starkey supplement its offer with more specific information. *See* PIB 88-7 [GSA 001814-16]; PIB 91-4 [GSA 0000462] According to GSA policy, the documentation in the file constitutes the record of the negotiation and events leading to acceptance of MAS contracts; *see also United States ex rel. Windsor v. DynCorp.,* 895 F. Supp. 844, 850-51 (E.D. Va. 1995).

The contracting officer's Price Analysis, which must delineate all major discounts offered to commercial customers and must identify any MFC or category of customer upon whom the offer is based, 48 C.F.R. § 15.805-2; FSS MAS Desk Guide at K4 [GSA 0001394], also fails to set forth the specificity of information which would be necessary to relators' claim. [FOIA 000293-94] There is no analysis of any price/discount relationship between the government and any designated MFC or customer category. *Id.* As explained in the FSS MAS Desk Guide, the "price/discount analysis is the conclusive explanation of the commercial discounts, terms and conditions, and therefore, depicts all of the essential contents, of the offer." FSS MAS Desk Guide at K6 [GSA 001395]. This redoubles the conclusion that Starkey's disclosure was proper and accepted as the basis of award, are well within the wide discretion of the contracting officer.

Based upon these disclosures, and the negotiations, a contract was agreed upon which provided significant discounts (37-40.5%) to the VA on five of Starkey's hearing aids, including

OSP circuitry at no cost, a 30% discount on a second-year warranty, a 31% discount on options, a waiver of postage and handling fees, and more favorable payment terms than are available to Starkey's commercial customers. By entering into the contract, the contracting officer necessarily found that the prices offered by Starkey to the VA were "fair and reasonable." 1982 GSA Policy Statement at X5 [GSA 001778].

Based upon these undisputed facts, the relators' claim of nondisclosure during the solicitation and negotiation process cannot stand because "[t]here can only be liability under the False Claims Act where the defendant has an obligation to disclose omitted information." *United States ex rel. Berge v. Board of Trustees of the Univ. of Ala.*, 104 F.3d 1453, 1461 (4th Cir. 1997); *Wilkins*, 173 F. Supp. 2d at 632. Here, the official contract file demonstrates that no request or expectation that Starkey disclose every discount and every hearing aid price Starkey offered to every one of its then 6,000 commercial accounts, as relators now choose to allege. *Compare, Norbeck*, 248 F.3d at 803 (noting rules were not as plaintiff alleged). Rather, Starkey disclosed, and the contracting officer accepted, a general range of discounts provided to Starkey's dealers and dispensers. *See e.g., United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402, 1411 (9th Cir. 1995) (recognizing that the government does not necessarily expect contractor's submissions to be error-free).

This common sense approach to negotiations, which recognizes the inherent discretion of the contracting officer for using whatever price analysis techniques are needed to ensure fair and reasonable prices, *Protest of Control Data Corp.*, 92-1 B.C.A. (CCH) P 24, 555, 1991 GSBCA Lexis 533, at *26 (Oct. 23, 1991), falls well within principles of government contracting and comports with the rationale of *Data Translation; see also Southland Mgmt. Corp.*, 288 F.3d at 688 (common sense definition of undefined contract term). As a matter of law, a FCA action cannot lie where both the contracting officer and the contractor saw eye to eye. *See McCoy*, 972 F.2d 344, 1992 WL 182816, at *3 (attached in Exhibit D to the Symchych Aff.) ("If both the contractor and the government interpret the contract one way throughout the contract's history, it is unthinkable that the contractor's billings which follow this common interpretation could constitute a false claim.")

Moreover, the very pleading of relators' price negotiation claim sets up an interpretive dispute as to how precise Starkey's disclosure needed to be. Given the imprecise language and discretion afforded the contracting officer, this contracting interpretation issue cannot support a reasonable inference of falsity within the meaning of the FCA. *See Hagood*, 81 F.3d at 1477 (holding that allocation was not false under the FCA where the question of "[h]ow precise or current the cost allocation needed to be in light of the statute's imprecise and discretionary language was a disputed question"). A practical interpretation, as counseled by *Data Translation*, of Starkey's pre-contract obligations not only avoids this pitfall, but is also in keeping with the 1982 GSA Policy Statement, which requires contractors only to provide a *sampling* of their top sellers. FSS MAS Desk Guide at C1 [GSA 001214-30]; 1982 GSA Policy Statement, X6 [GSA 001779].

2. The Price Reduction Clause Claim.

Similarly, relators' allegations regarding Starkey's obligation to report all discounts given to all of its customers during the course of the contract also fail to state a claim. The purpose of the Price Reduction Clause is to maintain the price relationship between any designated MFC or customer category and the government throughout the contract period. FSS MAS Desk Guide at P1 [GSA 001552]. (emphasis added). The specific customer or category of customer whose pricing arrangement will trigger the price reduction clause must be identified in the contract negotiation phase. FSS CH 38-97 [GSA 001431].

Here, the generic Price Reduction Clause states, "For the purpose of the Price Reduction Provisions, this contract is predicated on the Government receiving terms better than you offer to your dealers (dispensers)." [FOIA 000259] The agency guidance relating to identification of a MFC in the Price/Discount Analysis clearly indicates that any MFC should be an individual customer or category of customers, and not the contractor's entire pool of commercial customers. PIB 89-10 [GSA 000311-12]. Here, however, as relators admit in their Complaint, *all* of Starkey's commercial customers are dealers or dispensers. (Compl. ¶ 14.) As *Data Translation* so rationally teaches, equation of "Most Favored Customer" with "Each and Every Customer" constitutes an improper interpretation of the Price Reduction Clause. As the court noted in *Luckey v. Baxter Healthcare, Corp.*, 183 F.3d 730, 732 (7th Cir. 1999), "Only in Humpty Dumpty's world of word games would anyone apply the label 'fraud' to the kind of representations" made here.

The fact that the VA contracting officer did not identify a meaningful MFC anywhere in all of the contract documents prohibits, as a matter of law, any possibility that Starkey could have violated the False Claims Act by failing to provide rebates under the Price Reduction Clause. *See United States v. Caputo Co.*, 321 F.3d 926, 932-933 (9th Cir. 2003) (holding that there was no falsity under FCA for failing to pay prevailing wage where prevailing wage was not established by contract documents); *see also Tyger Constr. Co.*, 28 Fed. Cl. at 56 n.30, 57 (stating that "substantial completion" could not be evaluated objectively where the contract did not specifically define it). Here there is no meaningful MFC designation or identification of the category of customer upon whom the negotiations, despite (1) clear guidance that any such customer must be specifically identified, *see* FSS MAS Desk Guide at K6-K8 [GSA 001395-97]; FSS CH 38-95 [GSA 001408]; PIB 89-13 [GSA 00304-05]; FSS CH 38-98 [GSA 001471]; FSS CH 38-118 [GSA 001483]; FSS CH 38-96 [GSA 001560], and (2) the prenegotiation memorandum's stated objective "[t]o obtain discounts from offeror's established catalog or commercial price list which equal or exceed discounts offered by offeror to its most favored customer for compatible quantities, terms and conditions." [FOIA 000293]

Given the absence of any identified MFC to trigger the Price Reduction Clause, the Court must, under the reasoning of *Data Translation*, adopt a practical interpretation of that provision. Here, the Price Reduction Clause cannot be triggered by any given sale to any given customer because the contract terms do not permit such a triggering. Instead all discounts in the contract documents are tied directly to the general commercial discount range from Starkey's pricelist. This was the clear basis of the negotiations, the contracting officer's price analysis, and the award. As such, there is, and can be no contractual provision which can properly be interpreted to conclude that Starkey knowingly lied to the VA when it carried on the negotiations as it did and when it made post-award sales to commercial customers.

CONCLUSION

To require what relators allege should have transpired during contract negotiations and the term of the contract frustrates the very purpose of MAS contracting. As *Data Translation* teaches, to require a contractor to disclose every discount and police every sale to every customer prior to and during the duration of a lengthy government contract is impracticable, if not impossible. In the end, a "contract is to be interpreted in light of the totality of the circumstances that surrounded its formation, and the principal purpose of the parties is given great weight." *Norbeck*, 248 F.3d at 804-05. In the face of the contract documents and the applicable law, the strained allegations urged by relators should be curtailed in no uncertain terms at this juncture. This case is not prosecuted by the United States, which had an opportunity to intervene. Instead, two relators seeking a windfall bounty are its sole proponents. Just as the FCA must be preserved as an important tool to address fraud on the government, its draconian potential liabilities should not be threatened on a thinly, ill-conceived suit by parasitic seekers. *See Minnesota Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1049 (8th Cir. 2002), *cert. denied*, 537 U.S. 944 (2002) (Congress has sought to bar parasitic actions).[13] As the Fifth Circuit has noted, the FCA should not be used in a manner that would result in a sorry state of affairs unacceptable to all parties and wholly inconsistent with federal policy. *Southland Mgmt. Corp.*, 326 F.3d at 675.

For these reasons, Starkey Laboratories respectfully urges the court to grant its Motion for Dismissal with Prejudice and its Motion regarding the applicable Statute of Limitations.

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[13] *See also United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 224-25 (1st Cir. 2004) (same); *United States ex rel. Laird v. Lockheed Martin Eng'g & Science Servs. Co.*, 336 F.3d 346, 351 (5th Cir. 2003) (same); *United States ex rel. Feingold v. AdminiStar Federal, Inc.*, 324 F.3d 492, 495 (7th Cir. 2003) (same); *United States ex rel. Holmes v. Consumer Ins. Group*, 318 F.3d 1199, 1207-08 (10th Cir. 2003) (same); *Seal 1 v. Seal* A, 255 F.3d 1154, 1158 (9th Cir. 2001) *cert. denied*, 535 U.S. 1017 (2002) (same); *United States v. A.D. Roe Co.*, 186 F.3d 717, 722 (6th Cir. 1999) (same); *United States ex rel. LaCorte v. Smithkline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 233 (3rd Cir. 1998) (same); *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 682 (D.C. Cir. 1997) *cert. denied*, 522 U.S. 865 (1997) (same); *United States ex rel. Siller v.Becton Dickinson & Co.*, 21 F.3d 1339, 1348 (4th Cir. 1994), *cert. denied*, 513 U.S. 928 (1994) (same); *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 321 (2nd Cir. 1992) (same); *United States ex rel. Williams v. NEC Corp., 931* F.2d 1493, 1497-98 (11th Cir. 1991) (same).